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No. 85-263

Supreme Court, U.S.
FILED
OCT 7 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ELIJAH MAGGETTE,

Petitioner,

vs.

COOK COUNTY POLICE AND CORRECTIONS MERIT BOARD, ROBERT A. NOVELLE, SAMUEL W. NOLAN, E. JAMES GARBUTT, RICHARD J. ELROD, Sheriff of Cook County, and PHILIP T. HARDIMAN, Executive Director, COOK COUNTY DEPARTMENT OF CORRECTIONS,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1.

Whether the discharge of the petitioner for participating in an illegal "blue flu" job action denied him rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

2.

Whether the selection of the petitioner for discipline denied him his equal protection rights guaranteed by the Fourteenth Amendment.

3.

Whether the discharge of the petitioner and only a few others of those disciplined denied him his equal protection rights guaranteed by the Fourteenth Amendment.

4.

Whether a question of fact is determinable by this Court.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Cook County Police and Corrections Merit Board, Robert A. Novelle, Samuel W. Nolan, E. James Garbutt, Richard J. Elrod, Sheriff of Cook County, and Philip T. Hardiman, Executive Director, Cook County Department of Corrections, respectfully request that the Petition for a Writ of Certiorari be denied.

STATEMENT OF THE CASE

On January 20, 1980, jail guards at the Cook County Department of Corrections went on strike. The strike, which lasted for ten days, was characterized by a massive "call-in sick" campaign, which at times during this period involved 90% of the work force at the department.

The "work stoppage" created a public emergency, and necessitated the use of Forest Rangers, courtroom bailiffs, and others unschooled in correctional work to guard the inmates. (A.R. 586-587, 1225)

There had been warning that there would be a strike. At a meeting of the Cook County Board of Commissioners on January 16, 1980, large numbers of guards appeared demanding pay increases. Through statements made by some of the attending guards, their conduct, and a circular distributed which contained strike instructions, a work stoppage was plainly implicated if the guards' demands were not met. (A.R. 564-67, 2620) Petitioner Maggette attended this meeting. (A.R. 1045)

Acting upon this threat, Philip Hardiman, Executive Director of the Cook County Department of Corrections, prepared a memorandum outlining the procedures to be followed in the event of an emergency. This memorandum was received by the guards as they picked up their paychecks. It was also read at all roll calls on January 18, 19, and 20, 1980. (A.R. 581-84, 638)

Beginning with the morning shift on January 20, 1980, large numbers of guards began calling in sick. By the afternoon of January 20th, the situation had become so critical that Director Hardiman implemented his emergency plan. Petitioner called in sick on January 20th (A.R.

2627), but was observed on the picket line which suddenly appeared at the department on that date. (A.R. 1130) Most of the pickets, Petitioner excepted, wore ski-masks. The pickets carried signs demanding pay increases and shouted slogans.

At one point, during this picketing, Petitioner attempted to block a Sheriff's Investigator who was trying to speak with one of the other strikers. Petitioner shielded the other picket (Thomas White) with his body, threw out his arms, and exclaimed that Director Hardiman "would now have to deal with" Petitioner. (A.R. 1130-1131, 1148) Petitioner admitted being present on the picket lines possibly "more than twice." (A.R. 1050-1051)

Aside from the sick "call-ins," and the picketing (which continued through January 24th), there were almost nightly "labor rallies" at Operation P.U.S.H. headquarters. These meetings were presided over by the Rev. Jesse Jackson and were attended by between 50 and 400 guards each. Petitioner admitted attending at least five of these meetings, (A.R. 1050-1051), but explained his absence from work during the period of January 20 to January 30, 1980, by saying that he was sick. Petitioner offered no medical testimony or evidence at trial to support this assertion.

On January 24, 1980, Respondents secured a Temporary Restraining Order from Judge Joseph Wosik of the Circuit Court of Cook County, the effect of which was to order the striking guards to return to work. Petitioner was aware of this order, but failed to obey it. (A.R. 605, 610-611)

On January 26, 1980, Judge Wosik again ordered the guards to return to work, this time within 24 hours. Maggette was served with a copy of the restraining order, but again failed to return to work. (A.R. 617, 1149)

Meanwhile, on January 23, 1980, Sheriff Richard Elrod wrote a letter to Reverend Jackson offering "amnesty" to guards who returned to work within a reasonable time. On January 26, 1980, mailgrams were sent to all of the striking guards directing their return to work by January 29, 1980. (A.R. 619, 2660) Petitioner did not return to work on or before the date scheduled.

The record contains no testimony or evidence that the contents of the "amnesty" offer of January 23, 1980, was ever conveyed to Petitioner or relied upon by him, nor does it contain any explanation by Petitioner of why he ignored the mailgram which rescinded it.

On January 30, 1980, the striking jail guards returned *en masse*, Petitioner among them. (A.R. 636-637) Petitioner was not, however, permitted to resume his employment, but was notified that he was suspended pending a discharge hearing before the Cook County Police and Corrections Merit Board.

On April 23, 1980, Petitioner was found guilty of Contempt of Court by Judge Joseph Wosik for Petitioner's refusal to obey the Court's restraining orders. This judgment was never appealed. (A.R. 2662)

Discharge hearings were commenced before the Cook County Police and Corrections Merit Board against 34 guards of various ranks, races, and sexes. Fourteen of the cases were disposed of by trial, plea agreement or resignation while 20 guards (including Petitioner) who were represented by the same lawyer, were tried together.

Two of these were dismissed for insufficient evidence at the end of the Sheriff's case. The remainder were found guilty of all or some of the charges. Six, including Petitioner, were terminated. Three were demoted and suspended for six months. The remainder were suspended for six months.

Petitioner and all but one of the guards who were disciplined pursued Administrative Review to the Circuit Court of Cook County. The Circuit Court remanded the case to the Merit Board for additional findings of fact. After the additional findings were made, the Circuit Court reversed the Merit Board and ordered reinstatement of Petitioner and the others, holding that there had been a violation of the Equal Protection Clause of the Constitution of the United States.

Respondents then appealed to the Appellate Court of Illinois, First Judicial District, which ultimately, in an unpublished opinion, reversed the Circuit Court and reinstated the findings and orders of the Merit Board.

Petitioner then requested leave to appeal to the Supreme Court of Illinois, the denial of which has resulted in the filing of the instant Petition for Certiorari.

REASONS FOR DENYING THE WRIT

I.

DISCIPLINING THE PETITIONER FOR HIS PARTICIPATION IN AN ILLEGAL WORK STOPPAGE AND HIS VIOLATION OF WORK RULES DID NOT DEPRIVE HIM OF HIS RIGHTS UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Petitioner alleges that his punishment for taking an active part in an illegal work stoppage was a denial of the rights of free speech and equal protection guaranteed to him by the First and Fourteenth Amendments.

The Respondent contends that the acts for which the Petitioner was discharged did not constitute protected speech.

The Petitioner participated in a "blue-flu" job action over wages and benefits wherein some 970 of the 1,300 employees of the Cook County Department of Corrections attempted to shut down one of the largest jails in the country (4,200 inmates) from January 20 to January 30, 1980. (A.R. 585) The Petitioner was observed on a picket line outside the jail. (A.R. 1130) He attended five strike meetings during the time he was purportedly too sick to work. (A.R. 1051) He failed to obey two court injunctions ordering him to return to work. (A.R. 605, 610, 617, 1149) He failed to return to work on January 29, 1980, although ordered to do so by mailgram from the Department of Corrections. (A.R. 619, 636, 2660)

At the time of the illegal strike, public employees in Illinois had no inherent right to bargain collectively or to strike. *Board of Education v. Redding*, 32 Ill.2d 576, 207 N.E.2d 427 (1965). Under the new Illinois Public Labor Relations Act, P.A. 83-1012, effective July 1, 1984, some employees have a right to bargain collectively, but the Petitioner, as a security employee, still has no right to strike. Ch. 48, §1617(a), Ill. Rev. Stat. In deciding *Redding*, the Illinois Supreme Court relied on this court's opinions in *Hughes v. Superior Court of State of California, etc.*, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985 (1950); *International Brotherhood of Teamsters, etc., Local 309 v. Hanke*, 339 U.S. 470, 70 S.Ct. 773, 94 L.Ed. 995 (1950); and *Bakery & Pastry Drivers and Helpers Local 802 of Inter. Brotherhood of Teamsters v. Wohl*, 315 U.S. 769, 62 S.Ct. 816, 86 L.Ed. 1178 (1942). The *Redding* court held that the strike of [public] employees was illegal. Further, that court held that, while picketing has an ingredient of communication, the cases make it clear that it cannot be

dogmatically equated with constitutionally protected free speech, and aspects of picketing going beyond free speech may be subject to restrictive regulations. As this Court stated in *Hughes*, picketing is not beyond the control of a state if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives ground for its disallowance. 79 S.Ct. 718, 721.

In participating in the job action, the Petitioner was acting contrary to the laws of Illinois. Consequently, his picketing in support of that job action was for an illegal object and not protected speech.

The Respondent respectfully asks, therefore, that the petition for certiorari be denied.

II.

PETITIONER HAS FAILED TO DEMONSTRATE EITHER THAT HIS SELECTION FOR DISCIPLINE FOR HIS CONDUCT IN AN ILLEGAL STRIKE WAS BASED UPON AN OVERTLY DISCRIMINATORY CLASSIFICATION, OR THAT HIS SELECTION BOTH HAD A DISCRIMINATORY EFFECT AND WAS MOTIVATED BY A DISCRIMINATORY PURPOSE.

This case originated as a complaint brought by the Sheriff of Cook County against Petitioner and 33 other Cook County Jail Guards before the Cook County Police and Corrections Merit Board.

The Cook County Police and Corrections Merit Board is an agency established by statute and given the exclusive authority to, *inter alia*, remove, demote, or suspend correctional officers (jail guards) at the Cook County Department of Corrections. Ill. Rev. Stat., 1984, Ch. 125, §§52, 61, 62.

Petitioner Elijah Maggette, following a lengthy hearing, was found to have violated the conditions of his employment in a number of particulars including being absent from his assigned post, acting in concert with others to jeopardize the security of the Institution, failing to return to work as ordered by the Court, and failing to return to work as ordered in the January 27, 1980, mailgram. In essence, Petitioner was discharged for calling in sick when he was not, for failing to follow orders from his superiors, for refusing to follow orders by the Court, and for engaging in an illegal strike.

Historically, Illinois has prohibited the strike as a permissible labor tool by public employees. *Board of Education v. Redding*, 32 Ill.2d 567, 207 N.E.2d 427 (1965); *Battle v. Civil Service Commission*, 78 Ill.App.3d 828, 396 N.E.2d 1321 (1st Dist. 1979).[1]

On administrative review before the Circuit Court of Cook County, in the Illinois Appellate Court, and again in his Petition For Leave To Appeal before the Supreme Court of Illinois, Petitioner placed his principal reliance upon two civil rights cases decided by the United States Court of Appeals for the Seventh Circuit: *Olshock v. Village of Skokie*, 541 F.2d 1254 (7th Cir. 1976), and *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982).

It should be noted at this point that at no stage of the administrative or appellate proceedings in this case has Petitioner ever taken the position that he, as a public em-

[1] Since the disciplinary hearings in this case, Illinois has enacted a Public Employees Labor Relations Act. Ill. Rev. Stat., 1984, Ch. 48, §1601 *et seq.* Although some public employees are now permitted to strike, in certain limited situations, the Illinois Legislature has reiterated and given emphasis to the prior law which forbade strikes by police and corrections employees. Ill. Rev. Stat., 1984, Ch. 48, §§1617(a) and 1603(o).

ployee, had a constitutional right to engage in a strike which was prohibited by state law. This would be a difficult position to maintain since the Court's opinion in *Olshock*, upon which such heavy reliance has been placed by Petitioner, itself implicitly approved this Illinois practice. *Olshock v. Village of Skokie*, 541 F.2d 1254 at 1256, n.1 (7th Cir. 1976).

Nevertheless, Petitioner's reliance upon *Olshock* and *Ciechon* is misplaced for a number of other reasons.

First, both *Olshock* and *Ciechon* were actions brought in federal court under 42 U.S.C. §1983. The issues were markedly different from the outset. In the instant case the Sheriff of Cook County brought a disciplinary action before a local administrative agency, seeking Petitioner's discharge. The issues in this case were whether or not Petitioner had committed certain wrongs which merited discipline up to and including the sanction of discharge. The Merit Board was statutorily created to hear cases brought by the sheriff against his employees, not to hear cases *against* the sheriff. The proper forum for the relief requested by Petitioner, assuming *arguendo* the correctness of his argument, was not the Merit Board, but rather would have been a civil rights action filed in federal court.[2]

Second, both *Olshock* and *Ciechon* are legally and factually inapposite. In *Olshock*, the court's holding was bottomed upon the fact that all of the plaintiffs in that

[2] Petitioner, together with most of the other disciplined correctional officers, did file a §1983 action entitled *White v. Elrod*, which was No. 80 C 1524 in the United States District Court for the Northern District of Illinois, Eastern Division. Petitioner was dismissed from this suit on July 17, 1981. No appeal was taken from this dismissal. The suit went to trial on the remaining officers and resulted in findings adverse to all of the correctional officers on June 28, 1985.

case had been guilty of *identical* conduct, but that some had been discharged while others were simply suspended. It is apparent from the opinion that the Court of Appeals was convinced that the Plaintiffs who had been discharged were being punished for exercising their right to counsel. In the instant case, all twenty of those guards who went to trial in Maggette's case were represented by counsel, yet some were dicharged, some demoted, some suspended, and two had the charges against them dismissed at the close of the Sheriff's case. (A.R. 1465) There is no evidence in the record which suggests that only those who retained counsel were selected for disciplinary action.

In *Ciechon v. City of Chicago*, 686 F.2d 511 (7th Cir. 1982) the only difference apparent between the individual charged and the individual left unpunished was one of sex. Otherwise their culpability was *identical.*

Maggette attempts to fit himself into this category but his attempt must fail since the only "fact" he can produce in support of his position is that there were a large number of guards who went out on strike, yet only a small number were selected for discipline. He can show no selection on the basis of race, sex, religion, or even the legitimate exercise of the right to free speech. He merely keeps restating the figures and concludes that because all were not charged, his selection was based upon some invidious but unidentified classification.

Actually, several very valid reasons why Maggette was selected may be inferred from the record.

The first is that the quantum of proof against Maggette was greater than that against those who remained uncharged. For example, most of those who actively engaged in picketing at the department could not be readily identified because they wore ski masks. The case against them

would simply have consisted of the fact that they were absent from work. Maggette did not wear a ski mask and was on the picket line on a number of occasions. (A.R. 1050-1051)

Secondly, as noted by the Illinois Appellate Court in its opinion, the trial and dismissal of approximately 70% of the jail guards at the department would have debilitated it. (See: Petition, App. 9) A public emergency had already been created during the brief duration of the strike. It would have been senseless to take some 970 guards to trial with only a marginal chance of proving a case against most of them where the disposition of the 34 who were charged took nearly nine months, and the resources of the County had already been strained to the breaking point.

Thirdly, Maggette made himself a target by assuming a leadership role in the illegal strike. Although he now disputes this, the record is unambiguous on this point. Why else did Maggette invite the Director of the Cook County Department of Corrections to "deal with" him? (A.R. 1130-31, 1148)

This Court recently decided a case which bears certain persuasive similarities to the case at bar. In *Wayte v. United States*, ____ U.S. ____, 105 S.Ct. 1524 (1985), the Government's policy of "passive enforcement" was challenged. This Court, in holding the Government's policy to be constitutionally acceptable, noted that the petitioner was required to show both that the selection process "had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte, supra,* 105 S.Ct. 1524 at 1531. In the case at bar, Petitioner has shown neither of these things. Rather, he seeks to establish invidious intent by reference to a *rejected* offer of proof. (Pet. 13-14)

Petitioner has not been candid with this Court in the way he has sought to present this "offer of proof." The witness to whom Petitioner refers, one Arthur L. Jones, was one of the officers tried with Maggette. Prior to the appearance of Jones on the witness stand, Assistant Director Robert Glotz had testified, it being understood that Glotz would be unavailable for testimony in rebuttal. He was not asked any questions regarding the alleged formulation of the "hit list" of "creeps" to which Petitioner now refers, yet Petitioner and the other charged guards sought to impeach his testimony with that of Jones and without ever having given Glotz the opportunity to explain, admit or deny the statements Jones sought to attribute to him. (A.R. 1566-1573) This bad faith conduct on the part of Petitioner and his cohorts resulted in the offer of proof being rejected for evidentiary reasons. (A.R. 1570) It was not rejected, as Petitioner implies because the Merit Board refused to hear the constitutional issue. The rejection of this offer of proof was *never* challenged by Petitioner on review.

In summary, Petitioner has failed to show that he was selected for discipline on the basis of an overtly discriminatory classification, and he has likewise failed to point to competent facts in the record which show that his selection for disciplinary action was motivated by a discriminatory purpose or that it had a discriminatory effect.

Accordingly, Respondents respectfully request that the Petition for Certiorari be denied.

III.

PETITIONER CANNOT ESTABLISH DISCRIMINATORY PUNISHMENT WHERE THE FACTS IN THE RECORD SHOW THAT HE WAS NOT SIMILARLY SITUATED WITH THE GUARDS WHO WERE NOT DISCHARGED.

Petitioner next seeks certiorari for what he seeks to characterize as "invidious discrimination . . . among the 16 (guards) who were punished." (Pet. 19) In doing so he again cites *Olshock v. Village of Skokie*, 541 F.2d 1254 (7th Cir. 1976). His reliance upon *Olshock* is misplaced in the context of this discriminatory punishment argument as it was in his argument that he was selectively prosecuted, and for most of the same reasons.

It must again be emphasized that the *Olshock* holding was based upon the fact that all of those charged had engaged in *identical* conduct. The *only* basis for differing punishments was an impermissible one, the exercise of the right to counsel.

In the instant case, Maggette's conduct was different in both kind and degree from that of his co-strikers.

For example, Maggette has not mentioned that only he and the five others who were discharged were found guilty of Contempt of Court for their refusal to obey Judge Wosik's orders. (A.R. 2662)

In each of the examples cited by Petitioner himself, the word "except" appears, followed by the facts which illustrate that the involvement of the other guards who were not so severely disciplined was not *identical* to Maggette's situation at all. (Pet. 18-19)

Moreover, none of the guards who were merely suspended or demoted attended five labor meetings to give "moral support" to the other strikers (A.R. 1050-1051, 1057), were on the picket line on possibly more than two

occasions, *and* invited the Director of the department to "deal" with them. This situation was unique to Maggette.

Although the Board's findings may have been similar to those against co-strikers Bradley and Bailey "except" for the finding regarding Petitioner's failure to stay at home during his alleged illness, the facts supporting those findings were radically different. For example, neither Bradley nor Bailey was observed picketing.

Thus, the degree of involvement on Petitioner's part which supported the findings of the Merit Board was much more extensive than was that of the guards who were not discharged.

In summary, Petitioner cannot support with facts in this record that legal theory which he urges upon this Court. Accordingly, Respondents respectfully request that Maggette's Petition for Writ of Certiorari be denied.

IV.

WHETHER THE PETIIONER WAS ENTITLED TO AMNESTY IS NOT A FEDERAL QUESTION FOR DECISION BY THIS COURT.

The Petitioner contends that the Appellate Court of Illinois erred in holding that he was not entitled to amnesty. (Pet. 27) The Respondent contends that the so-called amnesty offer, if it was ever valid, was withdrawn before the Petitioner acted upon it.

In the course of negotiations to get the jail guards back to work, a letter was written by the Sheriff to one Jesse Jackson, who purported to act on behalf of the guards. In that letter, the Sheriff stated that no disciplinary action would be taken, if the jail guards returned to work in a reasonable time. (Pet. 28) Subsequent to that letter, two injunctions were obtained, ordering the Petitioner to

return to work. (A.R. 605, 610, 617, 1149) In addition, he was sent a mailgram ordering him to report to his regular shift on January 29, 1980, or face disciplinary action. He did not report to work by that deadline. (A.R. 619, 636, 2660)

In *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 29 S.Ct. 220, 221 (1909), this Court stated:

> The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities, and privileges of Federal origin, specifically set up in the state court, and denied by the rulings and judgment of that court. Nor does this court sit to review the finding of facts made in the court, but accepts the finding of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court.

Whether the Petitioner qualified for amnesty is a question of fact, which this Court may not retry. *St. Louis, I.M.&S. R. Co. v. Taylor*, 210 U.S. 281, 28 S.Ct. 616, 618 (1908). The Respondents therefore request that the Petition for Certiorari be denied.

CONCLUSION

Respondents, Cook County Police and Corrections Merit Board, Robert A. Novelle, Samuel W. Nolan, E. James Garbutt, Richard J. Elrod, Sheriff of Cook County, and

Philip T. Hardiman, Executive Director, Cook County Department of Corrections, respectfully request that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

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